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No. 84-194

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

LOUISE SHEARER, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF VERNON SHEARER, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the survivor of a serviceman who was murdered by another serviceman, while both were off duty and off base, may sue the government for damages under the Federal Tort Claims Act even though the Act bars "[a]ny claim arising out of assault [or] battery."

2. Whether such a suit, alleging that the negligence of the servicemen's superior officers was responsible for the murder, is precluded by the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), which bars suits by servicemen for alleged torts incident to military service.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Statement	3
Summary of argument	7
Argument	9
I. Respondent's claim is barred by the intentional tort exception to the Federal Tort Claims Act	9
II. Respondent's claim is barred by the *Feres* doctrine	24
Conclusion	33

TABLE OF AUTHORITIES

Cases:

Bell v. *New Jersey*, No. 81-2125 (May 31, 1983)	18
Blitz v. *Boog*, 328 F.2d 596, cert. denied, 379 U.S. 855	21
Block v. *Neal*, 460 U.S. 289	21-22
Brooks v. *United States*, 337 U.S. 49	32, 33
Brown v. *United States*, 739 F.2d 362, petition for cert. pending, No. 84-636	27
Bush v. *Lucas*, 462 U.S. 367	20
Chappell v. *Wallace*, No. 82-167 (June 13, 1983)	26, 27, 28, 29
Collins v. *United States*, 259 F. Supp. 363	10
Dalehite v. *United States*, 346 U.S. 15	12, 13
Fair v. *United States*, 234 F.2d 288	22, 23
Feres v. *United States*, 340 U.S. 135	*passim*
Gaudet v. *United States*, 517 F.2d 1034	21
Gibson v. *United States*, 457 F.2d 1391	22
Gilligan v. *Morgan*, 413 U.S. 1	27
Hatzlachh Supply Co. v. *United States*, 444 U.S. 460	5

Cases—Continued: Page

Henning v. *United States*, 446 F.2d 774, cert. denied, 404 U.S. 1016 31
Hicks v. *United States*, 511 F.2d 407 22
Hughes v. *Sullivan*, 514 F. Supp. 667 ..... 21, 23
Hughes v. *United States*, 662 F.2d 219, aff'g *Hughes* v. *Sullivan*, 514 F. Supp. 667 21
Jefferson v. *United States*, 178 F.2d 518, aff'd *sub nom. Feres* v. *United States*, 340 U.S. 135 28
Johnson v. *United States*, 631 F.2d 34, cert. denied, 451 U.S. 1018 31
Joseph v. *United States*, 505 F.2d 525 31
Kosak v. *United States*, No. 82-618 (Mar. 21, 1984) 9, 10, 13
Laird v. *Nelms*, 406 U.S. 797 12
Laird v. *Tatum*, 408 U.S. 1 32
Laswell v. *Brown*, 683 F.2d 261, cert. denied, 459 U.S. 1210 31
Lombard v. *United States*, 690 F.2d 215, cert. denied, 462 U.S. 1118 31
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. *Curran*, 456 U.S. 353 18
Monaco v. *United States*, 661 F.2d 129, cert. denied, 456 U.S. 989 31
Monell v. *Department of Social Services*, 436 U.S. 658 ..... 14, 20
Naisbitt v. *United States*, 611 F.2d 1350, cert. denied, 449 U.S. 885 21
Owen v. *City of Independence*, 445 U.S. 622 20
Panella v. *United States*, 216 F.2d 622 ..... 14, 15, 22, 24
Parker v. *Levy*, 417 U.S. 733 29
Rayonier, Inc. v. *United States*, 352 U.S. 315 9
Rogers v. *United States*, 397 F.2d 12 ..... 22, 23
Southard v. *United States*, 397 F. Supp. 409, aff'd, 535 F.2d 247 31
Stencel Aero Engineering Corp. v. *United States*, 431 U.S. 666 ..... 5, 26, 28, 29
Underwood v. *United States*, 356 F.2d 92 ..... 22, 23
United States v. *Brown*, 348 U.S. 110 ..... 25, 29, 30
United States v. *Muniz*, 305 F.2d 285, aff'd, 374 U.S. 150 ..... 22, 25, 29

Cases—Continued: Page

United States v. *Shively*, 345 F.2d 294, cert. denied, 382 U.S. 883 ..... 21, 23
United States v. *Spelar*, 338 U.S. 217 ..... 9, 12
Wine v. *United States*, 705 F.2d 366 21
Yolken v. *United States*, 590 F.2d 1303 31

Statutes:

Federal Tort Claims Act:
28 U.S.C. 1346(b) 2, 3, 11, 29
28 U.S.C. 2671 *et seq.* 3
28 U.S.C. 2674 29
28 U.S.C. 2680 ..... 2, 10
28 U.S.C. 2680(c) 10
28 U.S.C. 2680(h) ..... *passim*
Pub. L. No. 93-253, § 2, 88 Stat. 50 ..... 9, 17
5 U.S.C. 4301 *et seq.* 20
5 U.S.C. 8116(c) 19
10 U.S.C. 1475 30
10 U.S.C. 1477 30
10 U.S.C. 1478 30
38 U.S.C. 415 30
38 U.S.C. 765 30
42 U.S.C. 1983 14

Miscellaneous:

Boger, Gitenstein, & Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C.L. Rev. 497 (1976) 18
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General Tort Bill: Hearings Before a Subcomm. of the House Comm. on Claims, 72d Cong., 1st Sess. (1932) 13
2 F. Harper and F. James, *The Law of Torts* (1956) 15, 16
H.R. Rep. 97-384, (Pt. 1), 97th Cong., 1st Sess. (1981) 26
Note, *The Federal Tort Claims Act*, 56 Yale L.J. 534 (1947) 13

Miscellaneous—Continued: Page

W. Prosser, *Handbook of the Law of Torts* (4th ed. 1971) 15, 16
Reorganization Plan No. 2 of 1973: Hearings Before the Subcomm. on Reorganization, Research, and International Organizations of the Senate Comm. on Government Operations, 93d Cong., 1st Sess., Pt. 7 (1973) 18
Restatement (Second) of Agency (1958) 15, 16
Restatement (Second) of Torts (1965) 11, 24
S. Rep. 93-588, 93d Cong., 1st Sess. (1973) 17, 18
P. Schuck, *Suing Government* (1983) 20
The Feres Doctrine As It Relates to Private Claims: Hearings Before the Subcomm. on Agency Administration of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. (1982) 26
Tort Claims Against the United States: Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary, 76th Cong., 3d Sess. (1940) 13
Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary, 77th Cong., 2d Sess. (1942) 15

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 723 F.2d 1102. The statements on denial of rehearing (Pet. App. 34a-36a) are reported at 729 F.2d 266. The opinion of the district court (Pet. App. 24a-30a) is reported at 576 F. Supp. 672.

JURISDICTION

The judgment of the court of appeals (Pet. App. 31a-32a) was entered on December 19, 1983. A peti-

tion for rehearing was denied on March 7, 1984 (Pet. App. 33a-36a). On June 4, 1984, Justice Brennan extended the time in which to file a petition for a writ of certiorari to August 4, 1984. The petition was filed on August 2, 1984, and was granted on October 29, 1984. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

28 U.S.C. 1346(b) provides in part:

> Subject to the provisions of [28 U.S.C. 2671-2680], the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2680 provides in part:

> The provisions of [28 U.S.C. 2671-2680] and section 1346(b) of this title shall not apply to—
>
> * * * *
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this

> title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

STATEMENT

1. Respondent is the mother and administratrix of a serviceman, Private Vernon Shearer, who was stationed at Fort Bliss, Texas. While Shearer was off duty and off the base, he was kidnapped and murdered by another serviceman, Private Andrew Heard, who was also stationed at Fort Bliss and was also off duty at the time. This crime occurred in Otero County, New Mexico, which is adjacent to Fort Bliss. Pet. App. 2a-3a; J.A 5, 7. Heard was convicted of Shearer's murder in a New Mexico state court and sentenced to a term of 15 to 55 years' imprisonment (Pet. App. 22a; J.A 13).

Respondent subsequently brought this action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) and 2671 *et seq.*, seeking damages from the United States. She claimed that the Army's negligent failure to prevent Heard from murdering Shearer was responsible for Shearer's death. Specifically, respondent alleged (J.A. 14):

> 40. The United States Government, acting through its Department of the Army, * * * negligently and carelessly failed to exert a reasonably sufficient control over Andrew Heard, or take any action to prevent him from endanger-

> ing other people, in spite of the [government's] knowledge of his dangerous and murderous propensities, and further failed to warn other persons that he was at large, and of the danger which he presented.
>
> 41. The United States Government, acting through its Department of the Army, * * * negligently and carelessly failed to then remove Andrew Heard from active military duty, in spite of its knowledge of his dangerous and murderous propensities, with a reasonable degree of promptness given the great danger potential that he posed to other active duty service members, including [Shearer], none of whom were warned of the dangers posed.

Respondent asserted that in 1977, while Heard was assigned to an Army base in Germany, he was convicted by a German court of manslaughter and sentenced to a four-year prison term. In February 1979, when German authorities granted Heard an early release from that term, the Army promptly removed him from Germany and transferred him to Fort Bliss. By the time Heard killed Shearer, in June 1979, the Army had initiated proceedings to discharge Heard. J.A. 10-11.

2. The United States District Court for the Eastern District of Pennsylvania granted summary judgment in favor of the government (Pet. App 24a-32a). The district court did not address the government's contention that respondent's claim is barred by 28 U.S.C. 2680(h), the intentional tort exception to the FTCA, which provides in part that the government is not liable for "[a]ny claims arising out of assault [or] battery." See Pet. App. 29a n.4. Instead, the court ruled that respondent's claim is precluded by *Feres* v. *United States*, 340 U.S. 135 (1950),

which held that a serviceman may not sue the government under the FTCA for alleged torts incident to military service.

The district court stated that under *Feres*, the "question is not whether decedent was engaged in activity incident to military service when he incurred his injuries. Rather, the 'focus . . . is upon when and how the negligent act occurs' " (Pet. App. 26a (citation and emphasis omitted)). The court reasoned that because respondent "allege[d] that the Army was negligent in failing to exert reasonable control over" Heard, respondent's claims "relate directly to decisions of military personnel made in the course of the performance of their military duty and, therefore, are barred by *Feres*" (*ibid.*). The district court also noted that respondent is entitled to receive veterans' benefits (*id.* at 29a) and explained that "the existence of a no fault compensation scheme" for servicemen, veterans, and their survivors is another reason to apply the *Feres* doctrine (Pet. App. 28a-29a, citing *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673 (1977), and *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 464-465 (1980)).

3. A divided panel of the court of appeals reversed (Pet. App. 1a-23a). The court of appeals overturned the district court's ruling that *Feres* bars respondent's claim, explaining that "[g]enerally, an off-duty serviceman not on the military base and not engaged in military activity at the time of injury, can recover under FTCA" (Pet. App. 5a-6a) and that "being kidnapped off base at gun point can never be perceived as one of the activities or anticipated * * * benefits of being in the armed services" (*id.* at 7a; emphasis omitted).

The court of appeals also held that the intentional tort exception to the FTCA does not bar respondent's claim. The court noted that respondent's complaint alleged that the government was negligent and reasoned that "if an assault and battery occurred as a 'natural result' of the government's failure to exercise due care, the assault and battery may be deemed to have its roots in negligence and therefore it is within the scope of the FTCA" (Pet. App. 8a). Specifically, the court stated that the intentional tort exception would not preclude the claim of a plaintiff who "allege[d] sufficient facts which, if proven, would demonstrate that the government should have reasonably anticipated that one of their employees would commit an intentional tort" (*ibid.*). The court ruled that respondent's claim satisfied this standard because respondent alleged that the Army knew of Heard's "violent propensities" and that "[n]evertheless, Heard remained in the Army and was treated as a member in good standing * * * [and] enlisted men, including Shearer, were not warned about his violent past or present disposition" (*id.* at 9a).

Judge Garth dissented (Pet. App. 10a-23a). He noted his disagreement with the majority on the *Feres* issue (*id.* at 11a & n.1) but principally discussed the intentional tort exception. Judge Garth stated that respondent's claim, "although appearing on the surface to charge negligence is, in truth, no more than a complaint seeking monetary recovery for an assault and battery" (*id.* at 11a). He noted that Section 2680(h) applies to claims "arising out of" assault or battery and not just claims "for" assault or battery (see Pet. App. 13a-14a) and accordingly, by its terms, precludes respondent's claim.

The court of appeals denied rehearing en banc by a vote of 6-4 (Pet. App. 33a-36a).

SUMMARY OF ARGUMENT

I. The plain language of the Federal Tort Claims Act precludes respondent's claim. The FTCA bars "[a]ny claim arising out of assault [or] battery" (28 U.S.C. 2680(h)). Respondent's claim arises out of Heard's battery within the ordinary meaning of that phrase: Heard's battery gave rise to the injury to respondent, and respondent would have no claim if Heard had not committed a battery. Respondent cannot circumvent the intentional tort exception by framing a complaint that sounds in negligence, because the FTCA does not simply bar claims *for* assault and battery; it precludes any claim "arising out of" an assault or battery.

If the court of appeals' approach were to prevail, persons who claim to have been injured by the intentional torts of government employees could avoid Section 2680(h) simply by alleging that the government should have known of the employee's proclivities and should have done more to supervise or control him. Allowing such suits would thwart the purpose of the intentional tort exception, which is to preclude litigation over government employee's intentional torts. Moreover, under the court of appeals' approach, Section 2680(h) would bar claims by parties injured by government employees' intentional torts only when the sole basis of the claim is that the government is vicariously liable on a theory of respondeat superior; the language and legislative history of the FTCA, as well as the common law background against which it was enacted, all make it clear that Congress did not intend to distinguish between claims based on a respondeat superior theory and claims that, like respondent's, are based on a theory of "negligent supervision." Finally, in 1974 Congress amended Sec-

tion 2680(h) to permit FTCA actions to be brought for certain intentional torts committed by law enforcement officers; the legislative history of this amendment—indeed, the fact that Congress considered the amendment necessary—reinforces the conclusion that the FTCA does not permit suits like respondent's.

Furthermore, the court of appeals' ruling imposes liability on the government for the tort of an off-duty employee, a result Congress could not have intended. And by entertaining a claim that the government was negligent in its supervision of an employee, the decision below requires judicial examination of the government's personnel decisions and practices. Congress has enacted other statutes addressed to the government's practices in supervising its employees; it has never been thought that private parties can use the FTCA as a means of obtaining judicial review of the adequacy of those practices.

II. Respondent's claim is also barred by the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), which held that the FTCA does not authorize servicemen to sue the government for injuries incident to military service. Respondent's claim, brought on behalf of a serviceman, would require courts to second-guess sensitive military decisions relating to the discipline, control, and discharge of Heard, a fellow serviceman. Respondent's claim also threatens to subvert the command hierarchy by challenging, on behalf of a serviceman, the way in which the serviceman's superior officers discharged an important duty to him.

The court of appeals explained why *Feres* does not bar respondent's claim by emphasizing the fact that Shearer was off duty and off the base when Heard

injured him. But this explanation is belied by the very aspect of respondent's claim that the court of appeals most heavily stressed in justifying its erroneous interpretation of Section 2680(h)—the fact that respondent's claim challenges not Heard's actions but the disciplinary and command decisions of Heard's and Shearer's superiors. These are precisely the kinds of military decisions that the *Feres* doctrine is designed to insulate from judicial scrutiny.

ARGUMENT

I. RESPONDENT'S CLAIM IS BARRED BY THE INTENTIONAL TORT EXCEPTION TO THE FEDERAL TORT CLAIMS ACT

A. The "express words" of the Federal Tort Claims Act are a "[s]ufficient basis" for concluding that respondent's claim is barred (*United States* v. *Spelar*, 338 U.S. 217, 219 (1949)). See *Kosak* v. *United States*, No. 82-618 (Mar. 21, 1984), slip op. 5-6; *Rayonier, Inc.* v. *United States*, 352 U.S. 315, 318 (1957). The FTCA, by its terms, "does not apply" to "[a]ny claim arising out of assault [or] battery" 28 U.S.C. 2680(h)).[1] Respondent's claim "arises out of" the battery committed by Heard within the ordinary meaning of that phrase: Heard's tort gave rise to the injury to respondent, and respondent would have no claim if that tort had not been committed.

The court of appeals attempted to avoid the plain language of Section 2680(h) by reasoning that re-

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[1] In 1974, Congress amended Section 2680(h) to permit FTCA suits against the government for certain intentional torts of law enforcement officers. Pub. L. No. 93-253, § 2, 88 Stat. 50. There is no suggestion in this case that any of the government employees whose acts are at issue were law enforcement officers. See also pages 16-18, *infra*.

spondent's claim sounded in negligence, not battery. But this approach treats Section 2680(h) as if it barred claims *for* assault or battery. As Judge Garth noted in his dissent, that is not what the statute says. " 'Congress could easily have excepted claims *for* assault. It did not; it used the broader language excepting claims *arising out of* assault.' " Pet. App. 14a, quoting *Collins* v. *United States*, 259 F. Supp. 363, 364 (E.D. Pa. 1966). Unless Congress's choice of words is to be accorded no significance, the exception must be read to cover claims that sound in torts other than battery but nevertheless "arise out of" a battery. Respondent's suit presents such a claim.

This Court's decision last Term in *Kosak* v. *United States*, *supra*, reinforces this conclusion. In *Kosak* the Court construed the parallel exception, also contained in Section 2680, for "[a]ny claim arising in respect of * * * the detention of any goods or merchandise by any officer of customs" (28 U.S.C. 2680(c)). The Court equated the phrase "any claim arising in respect of" with the phrase "any claim 'arising out of' " (*Kosak*, slip op. 6) and held that such "encompassing" terminology has the broadest meaning: it "sweep[s] within the exception all injuries associated in any way with the 'detention' of goods." *Ibid.* It necessarily follows that the phrase "[a]ny claim arising out of assault [or] battery" must "sweep within the exception all injuries associated in any way with" a battery such as that committed by Heard.

B. The court of appeals did not identify the category of claims that, in its view, *are* precluded by the intentional tort exception. But the court's reasoning that respondent's claim is not barred because it sounds in negligence implies that the court would permit a plaintiff to seek damages under the FTCA

for any intentional tort committed by a government employee so long as the plaintiff alleged that the government was negligent in its selection, retention, or supervision of the employee. See Pet. App. 8a.

It is true that, in this case, Heard was indisputably acting outside the scope of his employment when he committed the intentional tort. The logic of the court of appeals' opinion, however, is not limited to employees acting outside the scope of their employment; claimants are equally able to allege that the government was negligent in its selection or supervision of employees acting within the scope of their employment, and the reasoning of the court of appeals' opinion would extend to such claims as well. Indeed, it would be paradoxical to try to limit the effects of the court of appeals' approach by confining it to cases in which an employee has acted outside the scope of his authority, because Congress could not have intended to impose on the government greater responsibility for the supervision of off-duty employees than for the supervision of employees acting within the scope of their authority. Congress expressly limited the government's liability under the FTCA to claims for injuries caused by employees "acting within the scope of [their] office or employment" (28 U.S.C. 1346(b)), and at common law, an employer has no general duty to exercise reasonable care to prevent an employee from injuring others while acting outside the scope of his employment and off the employer's premises. See Restatement (Second) of Torts § 315 (1965). This is true even if the employer knows of the employee's dangerous proclivities (see Restatement (Second) of Torts § 314) and even if the employer is fully able to control the employee's off-duty activities. See Restatement (Second) of Torts § 317 (specifying

limited circumstances in which the employer has a duty to control off-duty employees).

Thus, an allegation of "negligent supervision" would, under the court of appeals' approach, automatically enable any person injured by a government employee's intentional tort to hold the government responsible. If the court of appeals' approach were to prevail, therefore, it would create a substantial loophole in the intentional tort exception. Moreover, Section 2680(h) would become quite limited in its effect: it would preclude a claim by a party allegedly injured by a government employee's intentional tort only when the *sole* basis on which the claimant seeks damages is that the government is vicariously liable on a theory of respondeat superior.

1. As a practical matter, the court of appeals' interpretation of Section 2680(h) would, in all likelihood, thwart the purposes of the intentional tort exception by precipitating far more litigation over government employees' intentional torts than Congress envisioned when it enacted the FTCA. In this way, the court of appeals' decision would "judicially admit at the back door that which has been legislatively turned away at the front door" (*Laird* v. *Nelms*, 406 U.S. 797, 802 (1972)).

At the time the FTCA was enacted, the notion that the government would be exposed to liability for the torts of its employees was novel and controversial, and Congress considered the proposed waiver of sovereign immunity for an exceptionally long time. See *Dalehite* v. *United States*, 346 U.S. 15, 24 (1953); *Spelar*, 338 U.S. at 219. When Congress did enact the FTCA, its principal objective was to make the government liable for the ordinary negligence of its employees: "Uppermost in the collective mind of Congress were the ordinary common-law torts. Of these, the exam-

ple which is reiterated in the course of the repeated proposals for submitting the United States to tort liability is 'negligence in the operation of vehicles.'" *Dalehite*, 346 U.S. at 28 (footnotes omitted). See also *Kosak*, slip op. 7. Beyond the core area of negligent automobile accidents, Congress's intention was to proceed cautiously so as not to expose the government to litigation that would be difficult to defend and might lead to an excessive drain on the treasury. See Note, *The Federal Tort Claims Act*, 56 Yale L.J. 534, 547 (1947).[2] An authoritative source on the meaning of the FTCA (see *Kosak*, slip op. 8-9) explained to Congress that the "theory" of the intentional tort exception "is that, since this bill is a radical innovation, perhaps we had better take it step by step." *Tort Claims Against the United States: Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 76th Cong., 3d Sess. 22 (1940) (statement of Alexander Holtzoff).

Under the court of appeals' approach, however, a claim seeking damages for an intentional tort can be brought under the FTCA if the plaintiff "allege[s] * * * that the government should have reasonably anticipated that one of their employees would commit an intentional tort" (Pet. App. 8a). A party who claims

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[2] Indeed, when an Assistant Attorney General who was involved in the drafting of one of the bills that ultimately became the FTCA was called upon by members of a congressional committee to defend the breadth of the exceptions—including the intentional tort exception—he explained: "I suppose that the bulk of the cases we are trying to take care of are personal-injury cases caused by automobiles of the post-office service. There are no exceptions covering those." *General Tort Bill: Hearings Before a Subcomm. of the House Comm. on Claims*, 72d Cong., 1st Sess. 17 (1932) (testimony of Assistant Attorney General Rugg).

to have been injured by a government employee's intentional tort will often be able to make such an allegation by pointing to some aspect of an employee's record and asserting that it reveals a proclivity to engage in wrongful conduct. Congress's cautious approach strongly suggests that it did not intend to open the door to litigation over government employees' intentional torts in all of the numerous instances in which such an allegation might be made.

2. Neither the text nor the legislative history of the FTCA suggests that Congress intended to distinguish between claims for injuries from intentional torts that are based on a negligent supervision theory and claims based on a theory of respondeat superior, or that Congress intended to permit the former and preclude only the latter. Congress knew how to draft a statute authorizing damages actions against the government that would draw such a distinction and preclude only respondeat superior liability. See, *e.g.*, *Monell* v. *Department of Social Services*, 436 U.S. 658, 691-692 (1978) (plain language of 42 U.S.C. 1983 precludes respondeat superior liability of municipalities but permits liability for wrongful acts taken pursuant to municipal policy). But Congress expressed no such intention in the language of Section 2680(h). Instead, as we have noted, the plain language of Section 2680(h) bars "negligent supervision" and respondeat superior claims alike.

While the legislative history of the intentional tort exception is "meagre" (*Panella* v. *United States*, 216 F.2d 622, 625 (2d Cir. 1954) (Harlan, J.)), it, too, suggests that Congress did not distinguish between "negligent supervision" claims and respondeat superior claims. Cf. *Monell*, 436 U.S. at 693-695 & n.57. For example, Congress was advised by the Department of Justice that the intentional tort exception would apply where "some agent of the Government gets in a fight with some fellow * * * and socks him[.]" *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 33 (1942). See *Panella*, 216 U.S. at 626. But a government employee's fight would not necessarily, or even ordinarily, be a basis for imposing respondeat superior liability on the government. See Restatement (Second) of Agency, App., § 245, at 397 (1958) (Reporter's Note) (describing cases in which an employee's battery, growing out of altercation while on the job, was held not to be a basis for imposing liability on employer). Indeed, the law defining the circumstances in which an employee's "get[ting] in a fight" would be considered acting within the scope of his employment varies significantly from state to state. See Restatement (Second) of Agency § 245, comment b; 2 F. Harper & F. James, *The Law of Torts* 1392 & nn.16-20 (1956) (citing cases); W. Prosser, *Handbook of the Law of Torts* 465-466 (4th ed. 1971). To the extent an employee's fight does not constitute an act within the scope of employment, the only basis for a suit against the government would be a negligent supervision theory like respondent's. The legislative history suggests, however, that Congress believed claims growing out of employees' fights were barred by the intentional tort exception no matter what the theory of liability.

More generally, the common law background against which Congress enacted the FTCA makes it implausible to suppose that Congress would have enacted a broad exception for claims "arising out of" intentional torts solely in order to preclude respondeat

superior liability. In the nineteenth century, many courts held that *no* intentional tort committed by an employee would subject the employer to vicarious liability; those courts reasoned that intentional torts by definition are outside the scope of employment. See Restatement (Second) of Agency, App., § 245, at 390 (Reporter's Note) ("It was thought for some time that the rule [of respondeat superior liability] could not include situations in which a servant did an intentionally wrongful act toward the plaintiff"); 2 Harper & James, *supra*, at 1389 & nn.1, 2 (citing cases); Prosser, *supra*, at 464 & n.47. At the time Congress considered and enacted the FTCA, many jurisdictions continued to define more narrowly than today the category of intentional torts that would be viewed as being within the scope of employment. See Restatement (Second) of Agency, App., § 245, at 390-391; Prosser, *supra*, at 466 & nn.67-68. But neither the language nor the legislative history of Section 2680(h) gives any indication that it was directed only at the problem of respondeat superior liability for intentional torts—a problem that many members of Congress, at the time, may well have perceived as a relatively narrow and limited concern. On the contrary, the intentional tort exception was viewed as "represent[ing] a considerable limitation of substantive liability" (Borchard, *The Federal Tort Claims Bill*, 1 U. Chi. L. Rev. 1, 4 (1933)). There is no indication that Congress intended simply to adjust, in a relatively technical way, the showing a plaintiff must make in order to recover for injuries caused by a government employee's intentional tort; Congress intended to preclude litigation over such torts entirely.

3. The intentional tort exception was amended in 1974 to permit FTCA suits for certain intentional

torts by law enforcement officers. Pub. L. No. 93-253, § 2, 88 Stat. 50. The amendment provides:

> *Provided*, That with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of [the FTCA] shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

This amendment is not directly relevant to respondent's claim, because there is no suggestion that any of the government employees whose acts are at issue in this case is a law enforcement officer. But the legislative history of the amendment, and the fact that Congress considered it necessary to enact the amendment, reinforce the conclusion that Congress did not intend the intentional tort exception to be circumvented by an allegation of negligent supervision.

The legislative history of the 1974 amendment explains that it was adopted in response to reports of "several incidents" of "abusive, illegal and unconstitutional 'no-knock' raids" by federal narcotics agents. S. Rep. 93-588, 93d Cong., 1st Sess. 2 (1973). If the court of appeals' interpretation of the intentional tort exception were correct, no amendment would have been necessary to the extent that these raids were the result of negligent supervision by the agents' superiors. But although Congress had reason to believe that the incidents were the result of in-

adequate supervision—for example, it was alleged that agents from the same office were repeatedly involved in such incidents (see *id.* at 2)[3]—Congress never suggested that the victims of the raids might have been able to bring an FTCA action under the unamended statute.

On the contrary, the explicit premise of the 1974 amendment was that the unamended Section 2680(h) "protect[ed] the Federal Government from liability where its agents commit intentional torts such as assault and battery" (S. Rep. 93-588, *supra*, at 3). There is no indication that Congress believed the government's liability depended on whether the agents had been properly supervised: Congress's understanding of its own prior enactment was that Section 2680(h) precluded *all* claims for damages resulting from government employees' intentional torts, whatever the theory of liability. This congressional understanding is entitled to great weight. See, *e.g.*, *Bell* v. *New Jersey*, No. 81-2125 (May 31, 1983), slip op. 11 & n.12; *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 378 & n.61 (1982) ("[W]e must examine Congress' perception of the law that it was shaping or reshaping.").

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[3] See also Boger, Gitenstein, & Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N.C.L. Rev. 497, 502-503 (1976). Senator Percy, a leading proponent of the 1974 amendment, said he "hope[d]" that the incidents were "isolated" but that "there is evidence to show that there is a gestapo mentality that exists." *Reorganization Plan No. 2 of 1973: Hearings Before the Subcomm. on Reorganization, Research, and International Organizations of the Senate Comm. on Government Operations*, 93d Cong., 1st Sess., Pt. 7, at 1034 (1973). Senator Percy also stated, in a letter to the Department of Justice, that the illegal raids may have revealed the inadequacy of its procedures. *Id.*, Pt. 3, at 548-549. See also *id.* at 474 (remarks of Sen. Nunn).

C. Section 2680(h) should be given its plain meaning, and interpreted to preclude suits based on a "negligent supervision" theory, for the additional reason that the court of appeals' contrary approach would permit the FTCA to be used in ways that Congress could not have intended. Ordinarily, a court considering a claim under the FTCA will examine the events that occurred between the plaintiff and the government employee who allegedly inflicted an injury on the plaintiff. Respondent, however, in an effort to avoid Section 2680(h). has shifted the focus from the events that occurred between Heard and Shearer—since a claim that focused on those events would obviously be barred by the intentional tort exception—and has emphasized instead the relationship between Heard and his superior officers. This is strictly an intra-governmental relationship to which Shearer, the victim of the government's alleged tort, is a stranger. We know of nothing in the language or legislative history of the FTCA suggesting that an FTCA suit may have as its focus intra-governmental dealings between two federal employees. Cf. 5 U.S.C. 8116(c).

The court of appeals' decision to permit a "negligent supervision" claim is particularly inappropriate because, in order to decide such a claim, a court would necessarily have to review the adequacy of government personnel practices; the essence of a "negligent supervision" claim is precisely the allegation that certain personnel decisions made by the government in the course of supervising an employee were tortious. As we will discuss shortly, in the military context presented by this case that is a sufficient basis for concluding that respondent's claim is barred by the *Feres* doctrine. See pages 24-32, *infra*. But even

in a civilian context, a tort action for damages under the FTCA is not the proper vehicle for a judicial inquiry into whether the government is managing its employees in the correct fashion. Congress has devoted considerable attention to the regulation of federal personnel practices. See, *e.g.*, 5 U.S.C. 4301 *et seq.*; cf. *Bush* v. *Lucas*, 462 U.S. 367, 380-388 (1983). A court should, therefore, hesitate to evaluate the correctness of a personnel decision unless Congress has explicitly invited it to do so. See *Bush*, 462 U.S. at 388. It has never been thought that Congress, in enacting the FTCA, intended to authorize claimants to obtain judicial review of federal personnel practices.

Of course, by imposing vicarious liability on the government for the torts of its employees, the FTCA creates financial incentives for the government to improve its personnel practices so that its employees commit fewer and less severe torts. See, *e.g.*, *Monell*, 436 U.S. at 693 (one principal justification for holding an employer liable for the torts of its employee "is the common-sense notion that no matter how blameless an employer appears to be in an individual case, accidents might nonetheless be reduced if employers had had to bear the cost of accidents."); cf. P. Schuck, *Suing Government* 102-109 (1983); *Owen* v. *City of Independence*, 445 U.S. 622, 651-652 (1980). But since Congress chose to influence government supervisory practices indirectly, by holding the government liable in damages when its employees tortiously injure members of the public, there is no reason to believe that Congress also intended to allow members of the public to call upon courts to scrutinize those practices directly. Moreover, Section 2680(h) reflects Congress's decision *not* to hold the government responsible in damages when an employee

commits an intentional tort. This suggests that Congress did not view the FTCA as a means of inducing the government to improve its supervisory practices so as to reduce the likelihood that employees will commit intentional torts. The court of appeals therefore erred in allowing the FTCA to be used for that purpose.

D. As Judges Garth and Adams pointed out in their dissenting opinions below, every other court of appeals that has considered the issue has held that the FTCA does not permit the intentional tort exception to be circumvented by an allegation that the government was negligent in its supervision of the employee who committed the intentional tort. See, *e.g.*, *Wine* v. *United States*, 705 F.2d 366 (10th Cir. 1983) (battery committed by off-duty serviceman); *Naisbitt* v. *United States*, 611 F.2d 1350 (10th Cir.), cert. denied, 449 U.S. 885 (1980) (same); *United States* v. *Shively*, 345 F.2d 294, 297 (5th Cir.), cert. denied, 382 U.S. 883 (1965) (battery committed by off-duty serviceman with pistol negligently issued by the Army); *Hughes* v. *United States*, 662 F.2d 219 (4th Cir. 1981), aff'g *Hughes* v. *Sullivan*, 514 F. Supp. 667 (E.D. Va. 1980) (assault and battery committed by civilian employee while on duty). See also *Gaudet* v. *United States*, 517 F.2d 1034 (5th Cir. 1975); *Blitz* v. *Boog*, 328 F.2d 596, 598-599 (2d Cir.), cert. denied, 379 U.S. 855 (1964) (Marshall, J.) (in determining whether a claim is barred by the intentional tort exception, "[i]t is * * * the substance of the claim, and not the language used in stating it, that controls.").[4]

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[4] We note that *Block* v. *Neal*, 460 U.S. 289 (1983), does not support the court of appeals' interpretation of Section 2680(h). Neal's FTCA claim was not barred by the exception

Respondent (Br. in Opp. 7-9, 11, 12) and the court of appeals (Pet. App. 8a-9a) rely on decisions in a line of cases stemming from *Panella* v. *United States*, *supra*, in which a party injured by the intentional tort of a non-employee who was under the government's supervision—such as a prisoner or a patient in a government mental hospital—was allowed to bring an FTCA action on the claim that the government was negligent in its supervision of the tortfeasor. See, *e.g.*, *United States* v. *Muniz*, 305 F.2d 285, 287 (2d Cir. 1962), aff'd, 374 U.S. 150 (1963); *Hicks* v. *United States*, 511 F.2d 407 (D.C. Cir. 1975); *Gibson* v. *United States*, 457 F.2d 1391 (3d Cir. 1972); *Rogers* v. *United States*, 397 F.2d 12 (4th Cir. 1968); *Underwood* v. *United States*, 356 F.2d 92 (5th Cir. 1956); *Fair* v. *United States*, 234 F.2d 288 (5th Cir. 1956). But the rationale of these decisions is fully consistent with the result we urge here because—as Justice (then Judge) Harlan explained in *Panella* (see 216 F.2d at 624-626)—these cases involve intentional torts committed by persons other than government employees.[5]

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in Section 2680(h) for "[a]ny claim arising out of * * * misrepresentation" because Neal alleged injuries other than those resulting from the misrepresentations made by a government agency. As the Court explained, Neal's complaint would have alleged injury even if no misrepresentations had been made to her. See 460 U.S. at 297-298. Shearer's injury, by contrast, resulted from the intentional tort of a government employee; if Heard had not committed an intentional tort, Shearer would not have been injured.

[5] In some of the cases, the intentional tortfeasor was, for example, a dangerous mental patient who also happened to be a government employee; but the source of the government's duty to supervise him was his status as a patient, not his status as an employee.

As Judge Harlan recognized, a literal reading of Section 2680(h) might be thought to preclude a claim like that upheld in *Panella* and the cases that follow it. 216 F.2d at 624. But it is unnecessary to adopt such a reading in order to conclude that respondent's claim is barred.[6] When Congress drafted the FTCA, it was defining the extent to which the government would be liable for *employees'* torts. Consequently, when Congress mentioned specific torts in Section 2680(h), such as assault and battery, Congress must have had in mind, at least, assaults and batteries committed by government employees; Congress must have intended the exception to cover at least that category of intentional torts. Since Congress was not focusing its attention on torts committed by persons other than government employees, it is not necessary to conclude that Congress had such persons in mind when it enacted Section 2680(h).

Moreover, for policy reasons Congress would not necessarily have equated the intentional torts of government employees with the intentional torts of other persons the government supervises. The supervision of employees is a radically different governmental activity, in both its scale and the range of policy considerations it implicates, from the supervision of, for example, prisoners and patients. The supervision of the government's approximately four million military and civilian employees takes place

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[6] In fact, several of the cases on which respondent relies were decided by circuits in which respondent's claim would have been barred. Compare *Rogers* v. *United States*, *supra*, with *Hughes* v. *United States*, *supra*; compare *Underwood* v. *United States*, *supra*, and *Fair* v. *United States*, *supra*, with *United States* v. *Shively*, *supra*.

constantly and in virtually every place where the government is located; to a large extent the operation of the government consists of the supervision of employees. By contrast, the supervision of, for example, prisoners or mental patients is the product of a discrete governmental decision to engage in a certain specific activity, such as the operation of a prison or hospital; such decisions are made with the knowledge that the activity may pose special hazards to third parties. See Restatement (Second) of Torts § 319 (1965). Consequently, there is no inconsistency in concluding, as the *Panella* line of cases concludes, that Congress did not intend to subject the government to liability for the alleged negligent supervision of employees who commit intentional torts but did intend to hold it responsible for exercising due care when it undertakes supervision of dangerous non-employees.

II. RESPONDENT'S CLAIM IS BARRED BY THE *FERES* DOCTRINE

In explaining why the intentional tort exception does not preclude respondent's claim, the court of appeals repeatedly emphasized that the basis of respondent's claim was not Heard's intentional tort but rather the actions of Heard's and Shearer's military superiors, who allegedly were negligent in their supervision of Heard. But when the court of appeals considered the government's contention that respondent's suit is barred by the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950)—which held that the FTCA does not authorize suits by servicemen for alleged torts that are incident to military service—it radically altered its view of respondent's claim. A suit on behalf of a serviceman that challenges the supervisory decisions of superior officers implicates concerns at the very core of the *Feres* doctrine and should plainly be barred. In order to avoid that obvious conclusion, the court of appeals analyzed respondent's claim as if it were based on Heard's intentional tort. For example, it placed primary reliance on the fact that Shearer was off duty and off the base when he was killed (Pet. App. 5a-6a), and it remarked that "being kidnapped" is not an activity incident to military service (*id.* at 7a).

Respondent and the court of appeals cannot have it both ways. As we have explained, respondent should not be allowed to circumvent the intentional tort exception by framing a complaint that seeks damages for assault and battery but purports only to challenge the personnel decisions of Heard's and Shearer's superior officers. But if respondent does attempt to circumvent Section 2680(h) in this way, her claim is squarely barred by *Feres*.

1. The Court has explained that the *Feres* doctrine is principally based on the following considerations:

> the "peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty. . . ."

United States v. *Muniz*, 374 at 162, quoting *United States* v. *Brown*, 348 U.S. 110, 112 (1954). The Court has also explained that the purpose of the *Feres* doctrine is to avoid a trial at which courts must engage in "second-guessing military orders"; at which the "issue would be the degree of fault,

if any, on the part of the Government's agents"; and which would "require members of the Armed Services to testify in court as to each others' decisions and actions." *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673 (1977).[7]

Respondent's claim is a suit on behalf of a serviceman that explicitly challenges several military orders.[8] It therefore implicates these concerns in the most direct fashion. Specifically, respondent alleges that Shearer's superiors at Fort Bliss and elsewhere in the Army injured him because they: (i) "negligently and carelessly failed to exert a reasonably sufficient control over Andrew Heard," (ii) failed to "take any action to prevent [Heard] from endangering other person[s]," (iii) "failed to warn other persons that [Heard] was at large, and of the danger which he presented," and (iv) "negligently and carelessly failed to then remove Andrew Heard from active military duty." J.A. 14. Respondent thus seeks to have the courts inquire into basic decisions about the discipline, control, and discharge of another serviceman.

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[7] This Court has recently reaffirmed the *Feres* doctrine (*Stencel Aero Engineering Corp.* v. *United States, supra*; see *Chappell* v. *Wallace*, No. 82-167 (June 13, 1983)) and Congress has shown no disposition to overturn it in the 34 years since *Feres* was decided. See H.R. Rep. 97-384 (Pt. I), 97th Cong., 1st Sess. 5 (1981). See also *The Feres Doctrine As It Relates to Private Claims: Hearings Before the Subcomm. on Agency Administration of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982).

[8] It is immaterial that the suit was brought not by the serviceman but by a party claiming on his behalf; *Feres* itself was a suit by the executrix of the injured serviceman. See 340 U.S. at 136-137. See also Pet. App. 25a n.1.

If the court of appeals' approach were to prevail, a serviceman could force commanding officers to justify, to a court, the officers' decisions about, for example, whether to overlook an incident in the barracks or to impose a disciplinary sanction; whether to delay the discipline or discharge of a serviceman who has acted improperly so as to give him an opportunity to correct his behavior; whether a serviceman is fit to serve despite previous wrongful actions; whether a serviceman should be physically restrained or subjected to other punishments; and whether morale would be damaged if servicemen were warned at a particular time about the possible behavior of another serviceman. These are principal examples of "'[t]he complex, subtle, and professional decisions as to the composition, training, * * * and control of a military force [that] are essentially professional military judgments'" (*Chappell* v. *Wallace*, No. 82-167 (June 13, 1983), slip op. 6, quoting *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973)), and that should not be second-guessed by a court at the behest of a serviceman.[9]

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[9] The Eighth Circuit recently held that *Feres* barred a "negligent supervision" claim, similar to respondent's, that was brought on behalf of a member of the National Guard who had been the victim of a racially motivated intentional tort that occurred off duty. *Brown* v. *United States*, 739 F.2d 362 (1984), petition for cert. pending, No. 84-636. The court explained that such claims are precluded for the following reasons (739 F.2d at 368):

> The claim that various officers negligently failed to prevent the incident directly calls into question the disciplinary decisions of [the victim's] superior officers. Presumably what would be litigated is whether the officers should have issued some type of order, or otherwise taken disciplinary action, to prevent any type of racially

Moreover, the concerns underlying the *Feres* doctrine have special force where, as in this case, a serviceman challenges not just military decisions of general application but the specific way in which his superior officers have discharged their responsibilities to him. A central purpose of the *Feres* doctrine is to prevent "the disruption of '[t]he peculiar and special relationship of soldier to his superiors' that might result if the soldier were allowed to hale his superiors into court." *Stencel Aero Engineering Corp.*, 431 U.S. at 676 (Marshall, J., dissenting), quoting *Brown*, 348 U.S. at 112. Here, the court of appeals has allowed a serviceman's representative to hale the serviceman's superiors into court on the basis of a claim that they inadequately performed an important military duty—the duty to protect their subordinates—that they owed to the serviceman. As this Court has explained, Congress did not intend the courts to entertain claims that risk subverting the command relationship in this way:

> Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment.

Chappell, slip op. 4. See also *Jefferson* v. *United States*, 178 F.2d 518, 520 (4th Cir. 1949), aff'd *sub nom. Feres* v. *United States*, *supra* ("[E]ssential

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motivated actions. Under the *Feres* doctrine such a lawsuit cannot be maintained—it strikes precisely at the type of command relationship between a service member and his or her superior officers that is at the heart of the military disciplinary structure.

military discipline would be impaired by subjecting the command to the public criticism and rebuke of any member of the armed forces who chose to bring a suit."). Cf. *Parker* v. *Levy*, 417 U.S. 733, 763 (1974) (Blackmun, J., concurring) ("The subtle airs that govern the command relationship are not always capable of specification.").[10]

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[10] The Court in *Feres* identified two other bases for its decision. First, the Court noted that under the FTCA, liability depends on "the law of the place where the act or omission occurred" (28 U.S.C. 1346(b); see 28 U.S.C. 2674); by contrast, "[t]he relationship between the Government and members of its armed forces is 'distinctively federal in character'" and "has been governed exclusively by federal law" (340 U.S. at 143, 146; citation omitted). The Court reasoned that "it would make little sense to have the Government's liability to members of the Armed Services dependent on the fortuity of where the soldier happened to be stationed at the time of the injury." *Stencel Aero Engineering Corp.*, 431 U.S. at 671.

Second, the Court of *Feres* reasoned that because Congress, in enacting veterans' benefits statutes, had created "a comprehensive system of relief * * * for [servicemen] and their dependents" (340 U.S. at 140), Congress would not also have intended servicemen to recover under the FTCA for injuries incident to military service. See *id.* at 144; *Chappell*, slip op. 3. "[T]he Veterans' Benefits Act establishes as a substitute for tort liability, a statutory 'no fault' compensation scheme * * * * * [that] provides an upper limit of liability for the Government as to service-connected injuries." *Stencel Aero Engineering Corp.*, 431 U.S. at 671-673.

While neither of these concerns is dispositive in *Feres* cases, because the primary basis of *Feres* is the effect of servicemen's suits on military discipline (see *Chappell*, slip op. 3; *Muniz*, 374 U.S. at 162; *United States* v. *Brown*, *supra*), both of these concerns are important, and both are present here. It would be anomalous if the government's duties to supervise and to protect its servicemen were to depend on the local law of various states; such decisions must be made on a

2. The court of appeals avoided the obvious conclusion that respondent's claim is barred by *Feres* by stating that Shearer "was on leave in another state (New Mexico) when he was kidnapped" and "was not engaged in or acting incident to any military activity at the time of his murder" (Pet. App. 6a). But Shearer's location and status at the time of Heard's battery are immaterial, because—as the court of appeals emphasized in holding Section 2680(h) inapplicable—Heard's battery is not the actionable tort asserted in respondent's complaint.

The tortious acts alleged in respondent's complaint—and the only torts even arguably committed by any government employee within the scope of his employment—were the decisions made by Heard's and Shearer's military superiors with respect to the discipline, control, and discharge of Heard. Respondent's claim is that in making those decisions, the superior officers breached their duty of care toward Shearer. An injury suffered by a serviceman because his superior officers did not take reasonable care to protect him from a fellow serviceman is clearly an injury "incident to the military service" (*Brown*, 348 U.S. at 113); a claim based on that injury is therefore barred by *Feres*.

It is true that Shearer could not have become aware that he had suffered this injury, and perhaps did not have a cause of action, until Heard kidnapped him, an event that occurred while Shearer was off duty and off the base. But the basis of respondent's complaint is the breach of a duty that was

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uniform, nationwide basis. And the record establishes that Shearer's dependents are fully entitled to statutory veterans' benefits. See J.A. 15; Pet. App. 28a-30a; 10 U.S.C. 1475, 1477, 1478; 38 U.S.C. 415 and 765.

allegedly owed to Shearer by virtue of his being a serviceman on active duty. The fact that some of the consequences of the alleged breach of duty occurred while Shearer was off duty does not lessen the threat posed to military discipline by respondent's effort to second-guess the way in which Shearer's superior officers discharged their duty to him. Accordingly, the courts of appeals have consistently held that if the government is alleged to have breached a duty of care to a serviceman, *Feres* bars the serviceman's claim. This is true even if the serviceman had not yet enlisted at the time of the breach of duty;[11] had left the service by the time the physical injury caused by the breach of duty became manifest;[12] or, as here, was off duty and off the base at the time he suffered the injury caused by his superiors' alleged negligence. See, *e.g.*, *Johnson* v. *United States*, 631 F.2d 34, 37 (5th Cir. 1980), cert. denied, 451 U.S. 1018 (1981) (serviceman's claim is barred by *Feres* because "all the government actions that resulted in [the serviceman's] death were directly and substantially related to his military service" even though "the damage did not manifest itself until [the serviceman] left the post").

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[11] See, *e.g.*, *Yolken* v. *United States*, 590 F.2d 1303 (4th Cir. 1979); *Southard* v. *United States*, 397 F. Supp. 409 (E.D. Pa. 1975), aff'd, 535 F.2d 247 (3d Cir. 1976); *Joseph* v. *United States*, 505 F.2d 525 (7th Cir. 1974).

[12] See, *e.g.*, *Lombard* v. *United States*, 690 F.2d 215, 223-224 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983); *Laswell* v. *Brown*, 683 F.2d 261, 269 (8th Cir. 1982), cert. denied, 459 U.S. 1210 (1983); *Monaco* v. *United States*, 661 F.2d 129, 133 (9th Cir. 1981), cert. denied, 456 U.S. 989 (1982); *Henning* v. *United States*, 446 F.2d 774, 777 (3d Cir. 1971), cert. denied, 404 U.S. 1016 (1972).

For these reasons, the court below erred in concluding (Pet. App. 5a-7a) that this case resembles *Brooks* v. *United States*, 337 U.S. 49 (1949). *Brooks* held that an off-duty serviceman can sue under the FTCA for injuries sustained in an off-base automobile accident with a military vehicle. But in *Brooks*, the duty breached by the military driver was not a duty owed to the plaintiff because he was a serviceman but a duty owed equally to all members of the general public. As the Court explained (337 U.S. at 56): "[W]e are dealing with an accident which had nothing to do with [the plaintiffs'] army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired." Consequently, in *Brooks* the Court was asked to determine only whether the military had exercised the proper degree of care in taking actions that affected the public at large (cf. *Laird* v. *Tatum*, 408 U.S. 1, 15-16 (1972)); the claim in *Brooks*, unlike respondent's claim, would not have required courts to second-guess a military decision about the degree of care to be shown to a serviceman by his superior officers.[13]

[13] It is clear that this is the correct characterization of respondent's claim. For example, the complaint alleges that the Army's actions were unreasonable "given the great danger potential that [Heard] posed to other active duty service members, none of whom were warned of the dangers" (J.A. 14). Indeed, a principal negligent act alleged by respondent, and the alleged act most strongly emphasized by the court of appeals (see Pet. App. 3a, 9a), was the Army's alleged failure to discharge Heard as quickly as it should have. See Br. in Opp. 11 (respondent's "action is premised on the failure of Government officials to separate Private Heard from military service once they learned that he was unfit for such service"). The only duty that could possibly have been breached by this failure was a duty owed to Heard's fellow servicemen—not a duty owed to members of the general public, who are, if anything, placed in greater peril when a dangerous serviceman is discharged.

In any event, we submit that *Feres* should bar respondent's claim even if respondent attempts to revise it to allege only a breach of duty owed to members of the general public. In *Brooks*, the plaintiff asserted only that a military driver was negligent. Here, by contrast, a serviceman has called upon courts to review a much more sensitive category of military decisions. As a practical matter, such a claim will have the damaging effects on military discipline that *Feres* is intended to prevent, whether or not the serviceman attempts to confine his claim by asserting that he is suing not as a serviceman but merely in his capacity as a member of the public.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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